76-22

IN THE

Supreme Court of the United States

October Term, 1975

No. .....

DOUGLAS FRUCHTMAN

Petitioner,

vs.

FRANK KENTON, Warden,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

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To: The United States Supreme Court, October Term, 1975:

The petitioner, Douglas Fruchtman, prays that a Writ of Certiorari issue to review the judgment and order of the United States Court of Appeals for the Ninth Circuit filed February 27, 1976, affirming the judgment of the United States District Court for the Central District of

California and denying the petitioner's motion brought pursuant to Title 28, United States Code § 2255. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied on April 9, 1976.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit has not been published. A copy of the Memorandum Opinion filed February 27, 1976 appears in the appendix hereto as Appendix "A" (Appendix pp. 1 - 7). A copy of the order denying Petition for Rehearing and rejecting suggestion for a rehearing en banc, filed April 9, 1976, appears in the appendix hereto as Appendix "B" (Appendix p. 8). A copy of the letter from the Office of the Clerk of the United States Court of Appeals for the Ninth Circuit indicating the filing and entering of judgment is appended hereto as Appendix "C" (Appendix p. 9).

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was filed on February 27, 1976, affirming the judgment of the United States District Court in denying a petition pursuant to Title 28, United States Code § 2255. A copy of the letter judgment appears as Appendix "C" and the copy of the Memorandum Opinion appears as Appendix "A" hereto. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied on April 29, 1976. The order of the Ninth Circuit in denying the Petition for Rehearing and rejecting the suggestion for rehearing en banc appears

as Appendix "B" hereto. The Court's jurisdiction is invoked pursuant to Title 28, United States Code § 1254(1).

QUESTIONS PRESENTED

1. Whether the judgment against petitioner Fruchtman is void because the entry and acceptance of the plea of guilty leading to such judgment did not comport with either statutory or constitutional mandate through failure of the District Court to advise the petitioner of his right to confront and cross-examine witnesses and to compulsory process?

2. Whether the failure of the District Court to inform the petitioner that the entry of the plea of guilty would subject him to deportation rendered the plea invalid in view of the statutory and constitutional requirement that the petitioner be informed of the consequences of his plea?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment VI to the United States Constitution provides in part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Pertinent portions of the following statutory provisions appear in Appendix "D" hereto:

Title 8, United States Code § 1251 (Appendix pp.

10 and 11).

Title 28, United States Code § 2255 (Appendix p. 11).

Federal Rules of Criminal Procedure, Rule 11 (Appendix pp. 11 - 13).

STATEMENT OF THE CASE

A motion pursuant to Title 28, United States Code § 2255 was filed on behalf of Douglas Fruchtman in the United States District Court for the Central District of California on or about November 6, 1974. The motion alleged that Mr. Fruchtman was incarcerated at the Federal Prison Camp at Lompoc pursuant to a judgment entered March 4, 1974, sentencing him to eighteen months imprisonment to be followed by a three-year special parole term after entry of a plea of guilty in the Central District before the Honorable David W. Williams. The petition further alleged that Mr. Fruchtman, represented by appointed counsel, was at the time of the entry of his plea, not advised of his Sixth Amendment right to confrontation of witnesses, his right to compulsory process of the court to obtain witnesses in his own behalf, and of the fact that a plea of guilty would require his deportation pursuant to Title 8, United States Code § 1251.

The District Court's order denying the motion pursuant to 2255 was filed November 7, 1974.

The Reporter's Transcript of proceedings upon entry of the plea of guilty on February 5, 1974 (a portion of which appears attached hereto as Appendix "E," including

the reporter's Certificate) and the Reporter's Transcript of proceedings at the time of sentencing on March 4, 1974 (a portion of which appears appended hereto as Appendix "F," including the reporter's Certificate) demonstrate that Mr. Fruchtman was at no time informed of his right to confront and cross-examine his accusers, of his right to compulsory process, or that the entry of the plea would result in the deportation of Mr. Fruchtman, an alien.

The order of the District Court in denying the petition pursuant to § 2255 was affirmed by the United States Court of Appeals for the Ninth Circuit on February 27, 1976. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied on April 9, 1976.

REASONS FOR GRANTING A WRIT

I

The Judgment Against The Petitioner, Douglas Fruchtman, Is Void Because The Entry And Acceptance Of The Plea Of Guilty Did Not Comport With Either Statutory Or Constitutional Mandate Through Failure To Advise The Petitioner Of His Right To Confront And Cross-Examine Witnesses And His Right To Compulsory Process.

The Reporter's Transcript of proceedings at the time of the entry of plea and sentencing reflects the fact that the petitioner was advised of his right to trial by court or jury and of his right against self-incrimination. No mention is made, however, to the petitioner's right to confront and

cross-examine witnesses against him or to his right of compulsory process. The failure to so advise, and to obtain in open court an explicit, intelligent and knowing waiver of these rights, voids the entry of plea and the subsequent imposition of judgment.

The history of a necessity for a determination that a defendant's plea is voluntary and made with full understanding of the consequences was, prior to the adoption of Federal Rule of Criminal Procedure No. 11, in a state of disarray. Even after the adoption of that rule, the various Courts of Appeals differed in their perception of the proper remedy for violation of the rule. Eventually this conflict led to this Court's decision in *McCarthy v. United States,* 394 U.S. 459 (1969). In that case the Court limited itself to a strict analysis of the requirements of Rule 11, but found that one of the main purposes of the rule was to ensure that a defendant was fully aware of the constitutional rights which he was waiving through entry of the plea, and that he thereafter knowingly, intelligently and voluntarily waived those rights:

> "A defendant who enters such a plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers." (Footnote omitted.) 394 U.S. at 466.

The Court went on to apply the strict standard of *Johnson v. Zerbst,* 304 U.S. 458 (1938), that such a waiver could only be valid if there were "an intentional relinquishment or abandonment of a known right or privilege."

Two months later, this Court considered the constitutional aspects of the question in *Boykin v. Alabama,* 395 U.S. 238 (1969). Unlike *McCarthy, Boykin* involved the operation of the due process clause of the Fourteenth Amendment, thereby necessitating an analysis of the waiver principles on a constitutional basis. The Court, however, was clearly aware that the underpinnings of Rule 11 were designed to protect the constitutional rights enumerated there and, during the course of the *Boykin* opinion, quoted extensively from *McCarthy*. The Court again reiterated that a plea of guilty involved the waiver of three fundamental constitutional rights: "compulsory self-incrimination," "right to trial by jury" and "right to confront one's accusers" (395 U.S. at 243). Immediately after enumerating these rights, this Court stated:

> "We cannot presume a waiver of these three important federal rights from a silent record." (Footnote omitted.)

The problem of the silent record had earlier been considered in *Carnley v. Cochran,* 369 U.S. 506, 516, where the Court dealt with the problem of waiver of the right to counsel. This Court there held:

> "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver."

The applicability of the *Carnley v. Cochran* principle to the waiver of rights under a plea pursuant to *Boykin v. Alabama, supra,* is made clear by the direct reference to *Carnley* in *Boykin* and by the reiteration of the *Carnley* holding throughout the *Boykin* opinion. It thus becomes

apparent that the record of the plea, as a matter of constitutional law as well as pursuant to Rule 11 must expressly and unequivocally demonstrate that the defendant is informed of his constitutional rights and waives them. When taken together with the further requirement of Rule 11 that such inquiries must be made between the court accepting the plea and the defendant in person, it becomes abundantly clear that the record in the instant case, in view of its silence with regard to the right to confront witnesses, is insufficient both constitutionally and pursuant to Rule 11.

The principles announced in *Boykin* and *McCarthy* would appear to also apply to any constitutional right protected by due process of law and which is waived through the entry of a plea of guilty. In particular, it would appear that a knowing, intelligent and voluntary waiver must be demonstrated on the record with regard to a defendant's right to compulsory process. See *Washington v. Texas,* 388 U.S. 14 (1967).

The court below determined that a waiver may be valid if there is demonstrated to be an "understanding of the waiver of rights implicit in such a plea." How such an understanding is to be demonstrated, however, does not appear in the opinion of the court. The court appears to assume that the specific constitutional rights discussed in *Boykin v. Alabama, supra,* are known to a defendant if he is represented by counsel. However, it is clearly the duty of the court to assure itself of the voluntariness of the plea regardless of any discussions or representations made by counsel. It should also be pointed out that, under present practice, the burden upon the court is miniscule. The District Court

presently engages itself at the time of plea in a long period of questioning regarding the violation, possible promises or threats, and establishing a factual basis for the plea. To explain specifically to the defendant his constitutional rights takes very little extra time and is the only method of ensuring that the defendant is actually aware of these rights. To assume that a defendant who answers that his plea is "voluntary" understands the waiver of specific constitutional rights allows a presumption of validity and waiver to flow where such presumption is both irrational and in contradiction to the expressed statement in *Boykin* regarding the requirement of an explicit waiver upon the record.

II

The Failure Of The District Court To Inform The Appellant, An Alien, That The Entry Of The Plea Of Guilty Would Subject Him To Deportation Rendered The Plea Invalid In View Of The Statutory And Constitutional Requirements That A Defendant Be Informed Of The Consequences Of His Plea.

Federal Rules of Criminal Procedure Rule 11 requires not only that a court obtaining a plea of guilty personally determine from the defendant that the plea is voluntary, but also requires that the court ensure that the plea is entered "with understanding of the nature of the charge and the *consequences of the plea.*" Prior to the amendment of Rule 11 in 1966, this Court determined that a plea of guilty must be made with full understanding

of the consequences. *Kercheval v. United States,* 274 U.S. 220, 223 (1927). After *Kercheval,* a variety of Courts of Appeals determined that a failure to advise a defendant that the plea would have the effect of subjecting him to deportation was not a "consequence" in the meaning of the constitutional standard. Most notably among these was the Second Circuit opinion in *United States v. Parrino,* 212 F.2d 919.

As indicated in the preceding argument, the adoption of Rule 11 led to a great deal of confusion among the Circuits as to both its applicability and the remedy which was to be imposed for its violation. The decision in *McCarthy v. United States, supra,* resolved the variety of these questions. However, in footnote 20 of that opinion, this Court specifically left open the question as to the "nature of the inquiry required by Rule 11," noting that it must "necessarily vary from case to case." Subsequent Courts of Appeals opinions following *Parrino,* authored after the adoption of the rule, but not controlled by that rule, have been careful to note that the result may be changed by the adoption of Rule 11. See, for example, *United States v. Santellises,* 476 F.2d 787 (2nd Cir., 1973).

In any event, the Court in *McCarthy* indicated in footnote 20 that the nature of the inquiry required by Rule 11 should be based upon "matters of reality, not mere ritual . . . . " Such realistic considerations certainly must include the serious consequences of deportation. This Court has described deportation as a "drastic measure, at times the equivalent of banishment

or exile." *Fong Haw Tan v. Phelan,* 333 U.S. 6, 10; *Jordan v. DeGeorge,* 341 U.S. 223, 231. Justice Jackson, in his dissenting opinion in *Jordan v. DeGeorge, supra,* described it as "a life sentence of banishment" (341 U.S. at 232). See also the dissenting opinion of Judge Frank in *United States v. Parrino, supra,* 212 F.2d at 923, 924.

The artificial distinction between "direct" and "indirect" consequences, followed by the court below, appears to be too illusory to be the basis of a constitutional standard. The initiation of deportation proceedings pursuant to Title 8 flows as a matter of law from the entry of the guilty plea. The only distinction between such a "consequence" and others held to be "direct" is the fact that the deportation provisions appear at Title 8 of the United States Code rather than in that title which embodies the criminal action itself. However, it is elementary that the laws of the United States are to be considered as a unit and in *pari materiae.*

Certainly, the *effect* of deportation is at least as direct as other "direct" consequences. It flows from the sentence as inalterably as loss of state probation or parole (*United States v. Myers,* 451 F.2d 402) and the necessary imposition of a minimum parole term, each of which has been described as "direct".

There thus appears to be no rational distinction to classify deportation as "indirect" while classifying the other effects or consequences as "direct". It is submitted that the issue here confronted is one of the utmost importance to the administration of criminal justice.

The dire consequences are far from nebulous in the

present case and take the form of commanding petitioner Fruchtman to leave the country of his residence for the past twenty-two years, the country of which his ex-wife and two children are citizens, and the country which holds all his family ties. A mechanical application of precedent predating modern Rule 11 serves no useful purpose. Petitioner suggests that Rule 11 requires that a defendant alien be informed of the most drastic of consequences which is involved in his plea–submission to deportation.

CONCLUSION

The Court is asked to consider in the present petition vital issues relating to the sufficiency of the entry of pleas of guilty and the necessity for a full advisement by the court in order to ensure a knowing and intelligent waiver. The situation presented here is especially critical in view of the fact that petitioner Fruchtman, as an alien, shall be subject to deportation as a result of the entry of the plea, pursuant to Title 8, United States Code § 1251.

The petitioner entered the United States at the age of 11 and has continuously resided here for the past twenty-two years. His ex-wife and his children are all American citizens and his parents are permanent residents of the United States. He is responsible in part for the support of his seven-year-old son and ten-year-old daughter. He is further in part responsible for the support of his mother and his 61-year-old father, who is seriously ill. He has been consistently employed and has employment available within the United States. He has demonstrated himself to be a productive and valuable member of a society in which

he has lived since childhood. Nevertheless, the accident of his foreign birth shall, in the face of his plea of guilty, result inevitably in his banishment from his adopted country.

It is submitted that this case presents the proper opportunity for this Court to discuss the necessity for an intelligent and knowing waiver of specific constitutional rights and of the most direct consequence which is faced by an alien, that of deportation. It is therefore respectfully submitted that a Writ of Certiorari issue to review the judgment and order of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

MICHAEL D. NASATIR

DONALD M. RE

Attorneys for Petitioner

INDEX TO APPENDIXES

APPENDIX "A"

MEMORANDUM OPINION

In the United States Court of Appeals for the Ninth Circuit.

DOUGLAS FRUCHTMAN, Petitioner-Appellant,
v. FRANK KENTON, Warden, Respondent-Appellee.

No. 75-1757

[FILED February 27, 1976]

Appeal from the United States District Court
for the Central District of California.

Before: ELY, CHOY, and SNEED, Circuit Judges.

ELY, Circuit Judge:

Fruchtman, a federal prisoner, appeals from a district court order denying a motion for post-conviction relief brought under 28 U.S.C. § 2255.

Fruchtman and another were charged with possession of 943.8 grams of cocaine with intent to distribute it. The indictment consisted of several counts. On February 5, 1974, appearing with counsel, Fruchtman entered a plea of guilty to one count, whereupon, the remaining counts were dismissed at the request of the prosecution. Following conviction on the plea, Fruchtman was remanded to the custody of the Attorney General for a period of eighteen months, with the provision that such detention should be followed by a three-year special parole term.

On November 5, 1974, Fruchtman, acting through retained counsel, moved the sentencing court, pursuant to 28 U.S.C. § 2255, for an order setting aside his plea of

guilty on the grounds that he was not advised at the time the plea was entered of his Sixth Amendment rights of confrontation and compulsory process or of the fact that a plea of guilty would subject him to deportation under 8 U.S.C. § 1251. On November 7, 1974, the District Court entered its order denying all relief. This appeal followed.

Fruchtman here renews the contentions made below. He relies upon two distinct grounds for relief. First, he contends that the failure of the district judge specifically to advise him that a plea of guilty waived rights of confrontation and compulsory process under the Sixth Amendment offended the requirements of Rule 11, Fed. R. Crim. P. Second, it is claimed that the provision of Rule 11 that no plea be accepted without first determining that it is made "voluntarily with understanding of . . . the consequences of the plea"[1] required the District Court to advise Fruchtman, an alien, that conviction would subject him to deportation proceedings under 8 U.S.C. § 1251. We dispose of these questions in turn.

(1) Waiver of Specific Constitutional Rights

The appellant relies on *McCarthy v. United States*, 394 U.S. 459 (1969), and *Boykin v. Alabama*, 395 U.S. 238 (1969), for the proposition that a plea-taking proceeding is void when the court fails to advise the defendant that a guilty plea waives one's Sixth Amendment rights to confrontation and compulsory process. The argument is based on the Supreme Court's enumeration of a trio of constitutional rights relinquished by a plea of guilty:

> "A defendant who enters . . . a (guilty) plea simultaneously waives several constitutional rights, including his privilege against self-incrimination, his right to trial by jury, and his right to confront his accusers."

McCarthy v. United States, supra at 466 (footnote omitted). See also *Boykin v. Alabama, supra* at 243. From this appellant draws the conclusion that "the record of a plea, to be valid, must expressly and unequivocally demonstrate that the defendant is informed of his constitutional rights and waives them."

Subsequent decisions interpreting and applying *McCarthy* and *Boykin* have made it clear, however, that the focus of the decisions upon which Fruchtman relies is the requirement of a clear record that a defendant offering a plea of guilty does so voluntarily and with an understanding of the waiver of rights implicit in such a plea rather than the requirement of a ritualized enumeration of the specific constitutional rights waived. See *Brady v. United States*, 397 U.S. 742 (1970), and *North Carolina v. Alford*, 400 U.S. 25 (1970).

We have previously held that "neither *McCarthy* nor *Boykin* requires that a defendant be specifically advised of all of his constitutional rights by the trial court if his plea is to be valid. Nor do we think that due process or Rule 11 impose such a requirement. A criminal defendant possesses a great number of rights which he is foreclosed from asserting by the entry of a guilty plea." *United States v. Sherman*, 474 F.2d 303, 305 (9th Cir. 1973) (citations omitted).

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[1] Rule 11 was amended, effective August 1, 1975. Because this amendment did not become effective until after Fruchtman entered his plea, the effect of the amendment need not here be considered.

Our holding in *Sherman* was recently reaffirmed and applied to foreclose collateral attacks on state convictions by habeas petitioners in *Wilkins v. Erickson,* 505 F.2d 761 (9th Cir. 1974). "[S]pecific articulation of the *Boykin* rights is not the sine qua non of a valid guilty plea." *Id.* at 763. Other of our Courts of Appeal are in accord. See, *e.g., Todd v. Lockhart,* 490 F.2d 626, 628 n. 1 (8th Cir. 1974); *United States v. Dorszynski,* 484 F.2d 849, 851 (7th Cir. 1973), *rev'd on other grounds,* 418 U.S. 424 (1974); *Stinson v. Turner,* 473 F.2d 913, 915-16 (10th Cir. 1973); *Wade v. Coiner,* 468 F.2d 1059, 1061 (4th Cir. 1972); *United States v. Frontero,* 452 F.2d 406, 415 (5th Cir. 1971); *United States v. Webb,* 433 F.2d 400, 403 (1st Cir. 1970), *cert. denied,* 401 U.S. 958 (1971).

Here the record unmistakably discloses that, although the sentencing court did not specifically advise Fruchtman that his plea of guilty waived his rights to confrontation and compulsory process, the court did advise him that "you have a constitutional right to have a trial . . . before . . . a jury; that at that trial you may compel the Government to prove your guilt by competent evidence" (arguably a fair statement of the Sixth Amendment right to confrontation); that appellant was "giving up, . . . waiving (his) constitutional rights to have a trial" and "giving up and waiving (his) constitutional privilege against self-incrimination." In addition, the court specifically interrogated both Fruchtman and his counsel regarding the voluntariness of the plea. In short, we hold that the district judge adequately complied with the requirements of Rule 11. The failure of the district judge specifically to enumerate, *eo nomine,* the Sixth Amendment rights necessarily waived by the plea of guilty provides

no basis for the contention that the provisions of Rule 11 were not met.

(2) Failure to Advise Petitioner of all Consequences of the Guilty Plea.

Fruchtman's second contention is that the District Court failed to comply with the requirements of Rule 11 that an accused be informed of "the consequences of the (guilty) plea". It is conceded that Fruchtman, by virtue of his alien status, was rendered subject to deportation proceedings as a result of his conviction, presumably under subsection (a)(11) of 8 U.S.C. § 1251. Deportation being a drastic measure, Fruchtman argues that Rule 11 required that the court advise him of such a consequence before accepting his plea.

It is clear, of course, from the text itself, that Rule 11 requires a District Court determination that the consequences of a plea of guilty are understood by one who enters such a plea. It is equally clear that administration of the rule requires the development of some limiting guide to define the nature of the consequences of which a defendant must be advised so that the requirements of the rule shall have been met. The common distinction drawn is the distinction between consequences characterized as "direct" and those characterized as "collateral". Under this approach, Rule 11 requires the District Court only to advise a defendant of the direct consequences of a plea of guilty. The accused need not be advised of those consequences that can appropriately be denominated "collateral". Thus, some direct consequences of which a defendant must be informed under Rule 11 include the maximum allowable sentence (*Combs v. United States,* 391 F.2d 1017 (9th Cir. 1968), recidivist provisions (*Berry v.*

United States, 412 F.2d 189 (3rd Cir. 1969)), and loss of state probation or parole (*United States v. Myers,* 451 F.2d 402 (9th Cir. 1972)).

It has been held that some collateral consequences of which the defendant need not be informed under Rule 11 include civil proceedings leading to commitment (*Cuthrell v. Director, Patuxent Institution,* 475 F.2d 1364 (4th Cir.), *cert. denied,* 414 U.S. 1005 (1973), loss of good time credit (*Hutchison v. United States,* 450 F.2d 930 (10th Cir. 1971)), loss of right to vote and travel abroad (*Meaton v. United States,* 328 F.2d 379 (5th Cir. 1964), *cert. denied,* 380 U.S. 916 (1965)), and the possibility of undesirable discharge from the armed service (*Redwine v. Zuckert,* 317 F.2d 336 (D.C. Cir. 1963)).

The distinction between direct and collateral consequences is familiar to us. See *Johnson v. United States,* 460 F.2d 1203 (9th Cir.), *cert. denied,* 409 U.S. 873 (1972); *Tibbs v. United States,* 459 F.2d 292 (9th Cir. 1972); *United States v. Myers, supra; Hinds v. United States,* 429 F.2d 1322 (9th Cir. 1970); *Combs v. United States, supra.* Nevertheless, the precise issue tendered here, whether deportation constitutes a direct or collateral consequence, is one of first impression in our court. However, other Courts of Appeal have resolved the specific issue. The Second Circuit, for example, has recently reaffirmed its earlier, pre-Rule 11 holding in *United States v. Parrino,* 212 F.2d 919 (2d Cir.), *cert. denied,* 348 U.S. 840 (1954), that a defendant need not be advised of deportation as a consequence of a guilty plea. See *United States v. Santelises,* 509 F.2d 703, 704 (2d Cir. 1975); *Michel v. United States,* 507 F.2d 461, 464-65 (2d Cir. 1974) (grounded on Rule 11). *Accord, United States v. Sambro,*

454 F.2d 918, 922, *petition for rehearing* en banc *denied,* 454 F.2d 924 (D.C. Cir. 1971) (per curiam); *United States v. Briscoe,* 432 F.2d 1351 (D.C. Cir. 1970) (*semble*).

We agree with the Second Circuit that when, as in the case of deportation, the consequence in issue "was not the sentence of the court which accepted the plea but of another agency over which the trial judge has no control and for which he has no responsibility" (*Michel v. United States, supra* at 465), Rule 11 imposes no duty on the District Court to advise a defendant of such consequences. The collateral consequences flowing from a plea of guilty are so manifold that any rule requiring a district judge to advise a defendant of such consequence as that here involved would impose an unmanageable burden on the trial judge and "only sow the seeds for later collateral attack." *United States v. Sherman,* 474 F.2d 303, 305 (9th Cir. 1973).

AFFIRMED.

ORDER DENYING PETITION FOR REHEARING AND REJECTING SUGGESTION FOR A REHEARING EN BANC

In the United States Court of Appeals for the Ninth Circuit.

DOUGLAS FRUCHTMAN, Petitioner-Appellant, v. FRANK KENTON, Warden, Respondent-Appellee.

No. 75-1757.

[FILED April 9, 1976]

Before: ELY, CHOY, and SNEED, Circuit Judges.

The panel concerned with the subject case (Ely, Choy, and Sneed) has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

LETTER JUDGMENT

Office of the Clerk, United States Court of Appeals for the Ninth Circuit, U. S. Court of Appeals and Post Office Building, 7th and Mission Streets, P. O. Box 547, San Francisco, California 94101.

Re: 75-1757, DOUGLAS FRUCHTMAN vs. FRANK KENTON, Warden.

[DATED February 27, 1976]

Dear

An opinion was filed and a judgment entered in the above case today, Feb. 27, 1976, affirming the judgment of the court below (or administrative agency).

You have (14) days, from the above date, in which to file a petition for rehearing.

The mandate of this court shall issue (21) days after entry of judgment unless the court enters an order otherwise. If a petition for rehearing is filed and denied, the mandate will issue (7) days after the entry of the order denying the petition.

Sincerely,

EMIL E. MELFI, JR.
Clerk of Court

See Rules: 36, 40(a) and 41(a) of the Federal Rules of Appellate Procedure

CO 76.2

STATUTORY PROVISIONS

TITLE 8 UNITED STATES CODE § 1251

Deportable aliens–General classes

(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who–

. . . .

(8) in the opinion of the Attorney General, has within five years after entry become a public charge from causes not affirmatively shown to have arisen after entry;

(9) was admitted as a nonimmigrant and failed to maintain the nonimmigrant status in which he was admitted or to which it was changed pursuant to section 1258 of this title, or to comply with the conditions of any such status;

(10) entered the United States from foreign contiguous territory or adjacent islands, having arrived there on a vessel or aircraft of a nonsignatory transportation company under section 1228(a) of this title and was without the required period of stay in such foreign contiguous territory or adjacent islands following such arrival (other than an alien who is a native-born citizen of any of the countries enumerated in section 1101(a) (27) (A) of this title and an alien described in section 1101(a) (27) (B) of this title);

(11) is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of, or a conspiracy to violate, any law or regulation relating to the illicit possession of or

traffic in narcotic drugs or marihuana, or who has been convicted of a violation of, or a conspiracy to violate, any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of opium or coca leaves or isonipecaine or any addiction-forming or addicition-sustaining opiate;

. . . .

TITLE 28 UNITED STATES CODE § 2255

Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

. . . .

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 11. Pleas

. . . .

(c) Advice to Defendant. Before accepting a plea of

guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and

(2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent him; and

(3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and that he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and

(4) that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and

(5) that if he pleads guilty or nolo contendere, the court may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement.

(d) Insuring That the Plea is Voluntary. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of

force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or his attorney.

APPENDIX "E"

EXCERPTS FROM REPORTER'S TRANSCRIPT
Los Angeles, California, Tuesday, February 5, 1974, 9:00 a.m.
[upon entry of plea of guilty]
AND CERTIFICATE OF REPORTER

THE COURT: United States versus Fruchtman and Rubens.

MR. HABER: Yes, your Honor, Alan B. Haber for Mr. Rubens.

Mr. Rubens is present in court, your Honor. There will be a change of plea on behalf of Rubens.

MR. ZEITSOFF: Good morning, your Honor.

Vern Zeitsoff on behalf of Mr. Fruchtman, who is also present before your Honor, this morning, and we would likewise move to have the Court allow Mr. Fruchtman to withdraw his previously entered plea in this matter.

MR. MAYOCK: Good morning, your Honor, W. Michael Mayock for the Government.

THE COURT: Would that be a plea as to all counts?

MR. ZEITSOFF: Count III, your Honor.

MR. HABER: That is correct, your Honor.

THE COURT: One said, "Count III," and the other said, "That is correct."

What do you mean?

MR. HABER: There would be a plea to Count III.

THE COURT: As to each defendant?

MR. HABER: That is correct, your Honor.

THE COURT: Is that agreeable, Mr. Mayock?

MR. MAYOCK: Yes, it is, your Honor.

THE COURT: Is Douglas Fruchtman your true name?

DEFENDANT FRUCHTMAN: Yes, sir.

THE COURT: And is Daniel Rubens your true name?

DEFENDANT RUBENS: Yes, sir.

THE COURT: I will arraign you for plea separately, but jointly I will read Count III to you.

It reads that:

> "On or about November 7, 1973, in this judicial district, that Defendants Douglas Fruchtman and Daniel Rubens, knowingly and intentionally possessed with intent to distribute approximately 943.8 grams of cocaine, a Schedule II narcotic drug controlled substance."

Addressing myself only to you, Mr. Fruchtman, do you understand that as being the nature of the charge against you today in Count III?

DEFENDANT FRUCHTMAN: Yes, sir.

THE COURT: Mr. Fruchtman, have you discussed this count thoroughly with your lawyer?

DEFENDANT FRUCHTMAN: Yes, sir, I have.

THE COURT: Have you told him everything that he should know in order to properly advise you as to the plea that you should enter?

DEFENDANT FRUCHTMAN: Yes, sir.

THE COURT: Have you held anything back from him at all?

DEFENDANT FRUCHTMAN: No, sir, nothing.

THE COURT: Are you satisfied with his services to this point?

DEFENDANT FRUCHTMAN: Yes, sir.

THE COURT: Do you understand, Mr. Fruchtman, that you have no duty, you do not have to enter a plea of guilty; that you have a constitutional right to have a trial, and that you may have that trial before a Court or a jury; that at that trial you may compel the Government to prove your guilt by competent evidence beyond a reasonable doubt and to a moral certainty.

Do you understand that?

DEFENDANT FRUCHTMAN: Yes, sir, I do.

THE COURT: That if the Government fails to provide that level of proof, that you have a right to demand a dismissal of this charge.

Do you understand that?

DEFENDANT FRUCHTMAN: Yes, sir.

THE COURT: You understand that if you enter a plea of guilty to this charge, that you are giving up, you are waiving your constitutional rights to have a trial.

DEFENDANT FRUCHTMAN: Yes, sir, I understand that.

THE COURT: That you are giving up and waiving your constitutional privilege against self-incrimination.

DEFENDANT FRUCHTMAN: Yes, sir.

THE COURT: I have talked with no one about your case. I have not had any conversation with your lawyer or

with the United States Attorney or with any law enforcement officer; I have made no promises of any kind or character to anyone as to the type of sentence I would impose should you enter a plea of guilty.

Has anybody told you anything to the contrary?

DEFENDANT FRUCHTMAN: No, sir, they haven't.

THE COURT: Has anyone promised you what sentence you would receive should you enter a plea of guilty?

DEFENDANT FRUCHTMAN: No, sir, they haven't.

THE COURT: Has your lawyer told you the maximum sentence that you could conceivably get?

DEFENDANT FRUCHTMAN: Yes, sir.

THE COURT: What is that?

DEFENDANT FRUCHTMAN: Fifteen years.

THE COURT: And what is the fine?

MR. MAYOCK: $25,000, your Honor, with a special three-year parole term.

THE COURT: The maximum sentence, what is the maximum imprisonment term?

MR. MAYOCK: Fifteen years.

THE COURT: The maximum sentence is 15 years and/or $25,000, and by a special statute the law provides that should you be sent to prison for any term, that once you are released from prison you are subject to a three-year, at least a three-year special parole term, which means that you are still on parole for at least three years after you are out of prison.

Do you understand all of that?

DEFENDANT FRUCHTMAN: Yes, sir.

THE COURT: Do you still want to enter a plea of guilty to this count?

DEFENDANT FRUCHTMAN: Yes, sir.

THE COURT: Would you be entering that plea freely and voluntarily, without threat or fear to yourself or to anyone closely related to or associated with you?

DEFENDANT FRUCHTMAN: Yes, sir.

THE COURT: Would you be entering that plea for the sole reason that in truth and in fact you are guilty of this charge and for no other reason?

DEFENDANT FRUCHTMAN: Yes, sir.

THE COURT: Has anyone made any promises of a lesser sentence, probation, reward, immunity or anything else in order to induce you to plead guilty?

DEFENDANT FRUCHTMAN: No, sir.

THE COURT: Are you on bail at this moment?

DEFENDANT FRUCHTMAN: Yes, sir.

THE COURT: Have you within the last 48 hours partaken of any type of medicine or a drug that now clou[illegible] your mind so that you don't know what you are doing in entering this plea?

DEFENDANT FRUCHTMAN: No, sir.

THE COURT: Do you feel that your mind is clear at this moment?

DEFENDANT FRUCHTMAN: Very much so.

THE COURT: How do you plead to Count III, guilty or not guilty?

DEFENDANT FRUCHTMAN: Guilty.

THE COURT: Tell me briefly what it was that you did that brings you into court today on this charge, on this count. It has to do with some events of November the 7th of 1973.

DEFENDANT FRUCHTMAN: Sir, I made an attempt to distribute this cocaine.

THE COURT: Was the amount approximately 943.8 grams?

DEFENDANT FRUCHTMAN: Yes, sir.

THE COURT: And did you know at that time that it was cocaine?

DEFENDANT FRUCHTMAN: I believed it to be.

THE COURT: Counsel, have you fully advised the defendant?

MR. ZEITSOFF: I have, your Honor.

THE COURT: Have you made any promises to him about the sentence that he will receive?

MR. ZEITSOFF: None.

THE COURT: Do you concur in this plea?

MR. ZEITSOFF: I do.

THE COURT: Is it made with your advice and consent?

MR. ZEITSOFF: It is.

THE COURT: In your opinion, is there a factual basis for the plea?

MR. ZEITSOFF: In my opinion, there is.

THE COURT: Do you believe the plea to be made voluntarily, with understanding of the nature of the charge and the consequences of the plea?

MR. ZEITSOFF: Yes.

THE COURT: Mr. Zeitsoff, have you talked with the defendant this morning?

MR. ZEITSOFF: I have, your Honor.

THE COURT: And do you have the opinion that his mind is clear at this moment so that he knows what he is doing in entering this plea?

MR. ZEITSOFF: That is my opinion, your Honor.

THE COURT: After questioning the defendant, the Court finds that his guilty plea is made voluntarily, with understanding of the charge and the consequences of the plea, and that the defendant is free of any coercive influence of any kind; that he is pleading guilty because he did actually commit the crime charged and for no other reason, and that there is a basis in fact for the plea. The plea is accepted.

The Court orders preparation of a pre-sentence probation report.

Probation and sentence, March 4th, at nine o'clock. The defendant is ordered back at that time, and is ordered today to go to the Probation Department in this building and to file his application for probation, and to keep all appointments with the probation officer in aid of preparation of the report.

That defendant is excused.

(Proceedings as to this defendant concluded.)

CERTIFICATE

In the United States District Court, Central District of California, Honorable David W. Williams, Judge Presiding.

UNITED STATES OF AMERICA, Plaintiff, v. DOUGLAS FRUCHTMAN and DANIEL REUBENS, Defendants.

No. 13552-DWW-CD.

I hereby certify that I am a duly appointed, qualified and acting official reporter for the United States District Court, Central District of California.

I further certify that the foregoing 10 pages comprises a

true and correct transcript of the proceedings had in the above entitled cause on the dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 28th day of October, 1974.

CHRISTINE G. GLASSCO, CSR
Official Reporter

APPENDIX "F"

EXCERPT FROM REPORTER'S TRANSCRIPT
Los Angeles, California, Monday, March 4, 1974, 9:15 a.m.
[at time of sentencing]
AND CERTIFICATE OF REPORTER

THE COURT: United States versus Fruchtman and Reubens.

MR. MAYOCK: Good morning, your Honor, W. Michael Mayock, for the Government.

MR. HABER: Yes, good morning, your Honor, Alan B. Haber for Mr. Reubens.

Mr. Reubens is present in court, your Honor.

MR. ZEITSOFF: Good morning, your Honor, Vern Zeitsoff, with and for Mr. Fruchtman, who is also before your Honor for sentencing.

THE COURT: In the case of Douglas Fruchtman, the defendant entered a plea of guilty to Count III of a multi-count Indictment, and the Court ordered preparation of a pre-sentence probation report. I have read and considered that report. Is there any legal reason sentence should not now be imposed?

MR. ZEITSOFF: There is not, your Honor.

THE COURT: And in the case of Daniel Reubens, the defendant entered a plea of guilty to Count III, and the Court ordered preparation of a pre-sentence probation report. I have read and considered that report.

Is there any legal reason sentence should not now be imposed?

MR. HABER: There is none, your Honor, I would like to be briefly heard.

THE COURT: Yes.

I will say to both counsel that you should not gain too much heart from the recommendation of the probation officer because I don't feel that this is the type of case and these defendants involved is of the nature that warrants probation. I say that so that you may say anything that you want to say that you think is appropriate, despite the recommendation of the probation officer.

Mr. Fruchtman's counsel, Mr. Zeitsoff.

MR. ZEITSOFF: Yes, your Honor.

Even in light of your Honor's statements, Mr. Fruchtman is 33 years old, he will be -- he's 32, he will be 33 this following month. But for this occurrence, he certainly has no criminal record whatsoever and would otherwise have been described as a salesman and a family man.

THE COURT: He was a salesman in this, selling dope.

MR. ZEITSOFF: Well, I would, of course, be referring to a legitimate salesman, your Honor.

It is clear that Mr. Fruchtman became involved in certainly the greatest mistake of his life in this act, your Honor, and it is, of course, not to demean the fact that it is a very serious legal violation.

Everyone who knows Mr. Fruchtman, your Honor, and I believe that it's very, very crucial to this case, is totally shocked by this occurrence, no one more so than Mr. Fruchtman.

It is absolutely inconsistent with his prior exhibited character and behavior. There is no explanation either, your Honor, which adequately satisfactorily accounts for this conduct. Mr. Fruchtman is and certainly was then a very lonely man who had the last of a series of potential jobs, potential things, occupations to do with his life fall apart. That is, he was hired as a prospective buyer for the Warner Foods Company, and then the buyer did not leave the company.

I know your Honor considers many factors in imposing sentence, and I'm certain that this case presents, I'm hopeful that this case does in fact present difficulties to your Honor because there are certainly countervailing or inconsistent inputs in this case. I note that rehabilitation is an important purpose of this system. I know that this can be verified by the Assistant U. S. Attorney present in court in this case, your Honor, Mr. Fruchtman has made no evasion whatsoever on this matter. He has fully and completely admitted his guilt from the beginning. He has accepted his responsibility for this conduct and his extremely poor judgment. I think that that is important, your Honor.

I know that deterrent is related and is important. I think that there is no measure of the personal grief, remorse, sorrow that this man has felt with regard to this activity, your Honor. This is not a criminally oriented individual. I believe that there would be virtually no question whatsoever in the issue of deterrents that there would be any recurrence of this or any other act contrary to law by Mr. Fruchtman.

To the extent that retribution or punishment are always considered by your Honor as elements in the sentencing process, again I would state that Mr. Fruchtman has made and has paid dearly in personal anguish and personal remorse with regard to this matter. I can state categorically it is my opinion that if Mr. Fruchtman could undo this conduct he would do anything to do so in a moment, your Honor, anything legitimate, anything legal. Of course, he cannot do that. Certainly this is not a case where Mr. Fruchtman can assist the Government in other cases. I think that it's important, and I would strongly urge upon your Honor that incarcertaion, particularly for any lengthy period of time in this case, where Mr. Fruchtman has a first, and really, the first realistic expectation of real success in his life, your Honor, I believe that is set forth in Mr. Alba's letter.

Mr. Alba is present in court today. Mr. Alba has a very real potential employment for Mr. Fruchtman with which he can really make something of his life, something that he has not really been able to do in the 33 years of his life.

Mr. Alba, as I stated, is present in court, has stated to the probation officer and to myself that he would be willing to take any measure of responsibility for Mr. Fruchtman before this Court. His trust in Mr. Fruchtman is that great.

I believe that a substantial period of incarceration goes far beyond making any impression upon Mr. Fruchtman in rehabilitating Mr. Fruchtman, deterring Mr. Fruchtman, and I think that the other side of that coin, your Honor, should be considered heavily by this Court, that other side being that such incarceration has a real potential of doing serious irremediable harm to Mr. Fruchtman, to his family, and even more important, to his future and potential as a stable and productive citizen. I would hope that is the goal of this system in general.

In short, your Honor, I grant your Honor that this is a very serious offense, very serious. It can be stated simply as that. But that Mr. Fruchtman has, himself, in light of his prior record, in light of his performance as a stable citizen, is a man that is certainly deserving of trust and mercy and leniency by this Court.

I understand your Honor's position with regard to a lesson which must be learned from this matter. I would submit to your Honor that a split sentence with some minimal custodial time to further impress upon Mr. Fruchtman the act which he has done and to punish Mr. Fruchtman would more than adequately serve all the interests of society, and would also balance, your Honor, an attempt to minimize any negative results from this matter that are not negative results which this system would hope to achieve, any negative results which might harm his future and thereby make him less productive or less stable. I will close with that, your Honor.

THE COURT: Mr. Fruchtman, you have a right to address this Court; is there anything that you want to add to the statement of your lawyer?

DEFENDANT FRUCHTMAN: No, sir, other than the fact that I know what I did was wrong, and there is nothing I can say to take that away, and I have nothing to say.

MR. MAYOCK: Your Honor, may I be heard?

THE COURT: Yes.

MR. MAYOCK: Your Honor, the Government in this case has taken the liberty to talk to some of the DEA agents who were involved in this particular case. I've been advised by these agents that the involvement of the two defendants in this case is a singular one; that to their knowledge, and based also upon the way they handle this particular transaction it was very apparent they had no prior involvement in narcotics whatsoever.

I recognize the probation report is favorable, but this is a serious offense, and I know it's the Court's province to impose a sentence, but the Government's position would be that the Court should give special consideration to these defendants in imposing sentence.

THE COURT: As to the defendant Fruchtman, probation is denied and he is ordered to custody for a period of 18 months and to the custody of the Attorney General, and that is to be followed by a three-year special parole term period.

Is there a motion from the Government on remaining counts as to this defendant?

MR. MAYOCK: Yes, your Honor.

The Government would move to dismiss Counts I and II of the Indictment in the interest of justice.

THE COURT: Those counts are ordered dismissed.

MR. ZEITSOFF: If it please the Court, may I address

merely one more matter with regard to Mr. Fruchtman?

THE COURT: I thought I had heard you out, sir.

MR. ZEITSOFF: Your Honor, following your sentence may I ask leave of the Court that this sentence or incarceration of 18 months be stayed one week so that Mr. Fruchtman can adequately provide for his personal affairs?

THE COURT: No, I don't think that is called for, Mr. Zeitsoff.

He is ordered to custody.

(Proceedings as to defendant Fruchtman concluded.)

CERTIFICATE

In the United States District Court, Central District of California, Honorable David W. Williams, Judge Presiding.

UNITED STATES OF AMERICA, Plaintiff, v. DOUGLAS FRUCHTMAN and DANIEL REUBENS, Defendants.

No. 13552-DWW

I hereby certify that I am a duly appointed, qualified and acting official reporter of the United States District Court for the Central District of California.

I further certify that the foregoing is a true and correct transcript of the requested portion of the proceedings had in the above entitled cause on March 4, 1974, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 1st day of October, 1974.

CHRISTINE G. GLASSCO, CSR
Official Reporter

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, State of California, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 326½ Main Street, Huntington Beach, California 92648. that on JULY 7th, 1976, I served the within PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (FRUCHTMAN vs. KENTON) on the following named parties by depositing a copy thereof, or the number of copies designated below, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

United States Attorney
312 North Spring Street
Los Angeles, California 90012
3 COPIES

United States District Court
Central District of California
312 North Spring Street
Los Angeles, California 90012

Solicitor General of the United States
U. S. Department of Justice
Washington, D. C. 20530
3 COPIES

United States Court of Appeals
Ninth Circuit
P. O. Box 547
San Francisco, California 94101

I declare under penalty of perjury that the foregoing is true and correct.

Executed on JULY 7th, 1976, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer

Dean-Standefer Co., 326½ Main St., Huntington Beach, Ca.
(714) 536-7161

No. 76-22

In the Supreme Court of the United States

OCTOBER TERM, 1976

DOUGLAS FRUCHTMAN, PETITIONER

v.

FRANK KENTON, WARDEN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

ROGER A. PAULEY,
MERVYN HAMBURG,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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DOUGLAS FRUCHTMAN, PETITIONER

v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 531 F. 2d 946.

JURISDICTION

The judgment of the court of appeals was entered on February 27, 1976, and a petition for rehearing with suggestion for rehearing *en banc* was denied on April 9, 1976 (Pet. App. B). The petition for a writ of certiorari was filed on July 8, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court's failure to advise petitioner before accepting his guilty plea that he was waiving the rights of confrontation and compulsory process and that his conviction might subject him to deportation

proceedings justified vacation of his plea on collateral attack.

STATEMENT

Petitioner, a Canadian citizen, was indicted by a grand jury in the United States District Court for the Central District of California on three narcotics charges. At his arraignment, while represented by retained counsel, petitioner pleaded guilty to one count of the possession of cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1).

Before accepting his plea, the court asked petitioner, pursuant to Fed. R. Crim. P. 11[1], whether he had discussed the matter with and been thoroughly advised by counsel; whether he understood that by pleading guilty, he was waiving his privilege against self-incrimination and his right to a jury trial at which the government would be required to prove every element of the offense beyond a reasonable doubt; and whether his plea was the result of any promises regarding the length of sentence

---

[1]At the time petitioner entered his plea, Rule 11 provided, in pertinent part:

> The court may refuse to accept a plea of guilty, and shall not accept such plea * * * without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea.

Effective December 1, 1975, Rule 11 was amended to add a new subsection (c), which provides that the trial judge must expressly determine before accepting a guilty plea that the defendant understands, *inter alia*, his right to confront and cross-examine the witnesses against him at trial. Although it is inapplicable to his case (see Pet. App. A, p. 2, n. 1), petitioner has set forth the text of the newly amended Rule 11(c) in Appendix D to his petition.

to be imposed. Petitioner responded appropriately to each question (Pet. App. E, pp. 13-19). The court and the prosecutor also informed petitioner that the maximum penalty for this offense was fifteen years' imprisonment, a $25,000 fine, and a special parole term of at least three years. Petitioner replied that he understood the maximum penalties provided for the offense and that he was pleading guilty voluntarily. He also admitted that he had knowingly attempted to distribute a quantity of cocaine on November 7, 1973, as charged in the indictment (Pet. App. E, pp. 17-18).

The court also questioned petitioner's lawyer, who stated that he had fully advised petitioner and that he concurred in the plea, which, in counsel's view, was being entered voluntarily and with knowledge of its consequences (Pet. App. E, p. 18). The court thereupon accepted petitioner's guilty plea and subsequently sentenced him to eighteen months' imprisonment, to be followed by three years' special parole (Pet. App. F, p. 25).

Ten months after the entry of his plea, petitioner filed the instant petition in the district court pursuant to 28 U.S.C. 2255 seeking to vacate his conviction. He contended that in its Rule 11 inquiry, the district court improperly failed to inquire whether he understood that he would waive the rights of confrontation and compulsory process by pleading guilty and to advise him that entry of a guilty plea would subject him to deportation proceedings. The district court denied relief without a hearing, and the court of appeals affirmed (Pet. App. A).

ARGUMENT

1. Petitioner contends (Pet. 5) that his plea was not entered voluntarily and thus was invalid because the district court did not specifically advise him that he was

waiving his rights of confrontation and compulsory process by pleading guilty.

At the time of petitioner's arraignment, Fed. R. Crim. P. 11 provided that the district court should not accept a guilty plea without first "determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea." Contrary to petitioner's assertion (Pet. 6-8), the district court was not required to inform him of a specific, talismanic set of rights he was waiving in order for his guilty plea to be valid. See *Brady* v. *United States,* 397 U.S. 742. Rather, "the standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *North Carolina* v. *Alford,* 400 U.S. 25, 31.

Here, the record demonstrates that the district court adequately satisified its obligation under Rule 11 to determine that petitioner's plea was voluntary and intelligent. The court advised him that he had a constitutional right to a jury trial at which the government would bear the burden of proving his guilt beyond a reasonable doubt by competent evidence, and that by pleading guilty, he was waiving his right to a trial and his privilege against compulsory self-incrimination (Pet. App. A, pp. 6-7). Where petitioner thus was sufficiently informed of his fundamental rights, the district court's failure to recite a complete litany of the constitutional rights waived by his guilty plea did not violate Rule 11. *United States* v. *Gearin,* 496 F. 2d 691, 696 (C.A. 5); *Wade* v. *Coiner,* 468 F. 2d 1059 (C.A. 4); *Sappington* v. *United States,* 468 F. 2d 1378 (C.A. 8), certiorari denied, 411 U.S. 970. Moreover, the court specifically questioned both petitioner and his attorney concerning

the voluntariness of the plea and further established that there was a factual basis for the plea.[2]

2. Petitioner also contends (Pet. 9) that his plea was not made with full understanding of its consequences because the district court did not advise him that a guilty plea to a narcotics offense would subject him to deportation proceedings. However, all the courts of appeals that have considered this claim have uniformly rejected it. See *Nunez Cordero* v. *United States,* 533 F. 2d 723 (C.A. 1); *Michel* v. *United States,* 507 F. 2d 461 (C.A. 2); *United States* v. *Sambro,* 454 F. 2d 918 (C.A. D.C.); *United States* v. *Parrino,* 212 F. 2d 919 (C.A. 2), certiorari denied, 348 U.S. 840.

As the court of appeals observed (Pet. App. A, p. 7), a deportation order is not entered by the court that accepts the guilty plea but is the result of a separate administrative proceeding, which must be initiated by another agency over which the court has no control and for which it has no responsibility. It is well established that when accepting the defendant's guilty plea, the court need not advise a defendant of such collateral consequences. *Michel* v. *United States, supra,* 507 F. 2d at 465; see *Cuthrell* v. *Director, Patuxent Institution,* 475 F. 2d 1364 (C.A. 4), certiorari denied, 414 U.S. 1005.

Rule 11 does not require the court to anticipate all possible ramifications of a guilty plea for a defendant.

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[2]In any event, due to the amendment of Rule 11 effective December 1, 1975, to require that the district court determine that a defendant understands his right of confrontation before accepting his plea, the issue presented here is of little prospective significance.

Indeed, there is no indication in the record that the district court was even aware that petitioner was an alien when it accepted his plea. The court of appeals therefore correctly held that "[t]he collateral consequences flowing from a plea of guilty are so manifold that any rule requiring a district judge to advise a defendant of such consequence as that here involved would impose an unmanageable burden on the trial judge and 'only sow the seeds for later collateral attack' " (Pet. App. A, p. 7). See *Michel* v. *United States, supra,* 507 F. 2d at 466.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

ROGER A. PAULEY,
MERVYN HAMBURG,
Attorneys.

SEPTEMBER 1976.

DOJ-1976-09